STATE OF MICHIGAN

COURT OF APPEALS

BALCOM MARINE CENTRES, INC.,

Plaintiff-Appellant,

v

TERRY HOEKSEMA and DOORNBOS & HOEKSEMA,

Defendants-Appellees.

UNPUBLISHED
January 28, 2010

No. 288292
Muskegon Circuit Court
LC No. 08-045762-NM

Before: Donofrio, P.J., and Meter and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) and denying plaintiff's motions. Because the trial court correctly found that it had no authority to allow plaintiff to amend its name in the 1994 and 2005 lawsuits and further properly ruled that allowing plaintiff to amend the pleadings in the instant 2008 case to correct its name would be a futile act, and because the doctrine of res judicata barred the 2005 case, we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This appeal arises as a result of three underlying lawsuits that were filed in 1994, 2005, and 2008. In 1994, Don Balcom, the owner of plaintiff Balcom Marine Centres, Inc. (incorporated and registered with the State of Michigan in 1984 as "Balcom Marina Centres, Inc.") sued Sigrud Rudholm and his company, Balcom Marina, Inc. (hereinafter Marina) regarding the terms of a lease and purchase agreement of a marina. During the bench trial, plaintiff moved for leave to file an amended complaint seeking to add a claim of "piercing the corporate veil" to seek individual liability against Rudholm. Rudholm argued, and the trial court subsequently agreed, that the "piercing the corporate veil" claim was filed too late and would prejudice Rudholm. Thus, the trial court denied plaintiff's motion to amend. Ultimately, the trial court entered judgment in favor of plaintiff against Marina in the amount of $178,239.06, with the sum of $9,603.15 to be joint and several against both Rudholm individually and his company, Marina. However, the trial court issued a supplemental order eliminating the judgment against Rudholm individually as already satisfied. As a result, the judgment in the case stood at $178,239.06 against Marina alone. Plaintiff never collected on the judgment against Marina because Marina had no assets and was dissolved in 1996.

Plaintiff hired defendants to file suit on its behalf against Rudholm in March 2005, alleging a claim for "piercing the corporate veil." Rudholm moved for summary disposition based on the doctrine of res judicata and the statute of limitations. The trial court agreed with Rudholm and the case was dismissed in February 2006.

In 2008, plaintiff sued defendants, claiming negligent handling of the 2005 case and arguing that defendants failed to properly pursue the "piercing the corporate veil" theory. Defendants responded by asserting that res judicata barred the claim of "piercing the corporate veil" in the 2005 case and, accordingly, plaintiff could not establish proximate cause demonstrating legal malpractice. Plaintiff moved for partial summary disposition on the issue of res judicata pursuant to MCR 2.116(C)(9) and MCR 2.116(C)(10). Defendants filed a cross motion for summary disposition pursuant to MCR 2.116(C)(10) based on res judicata and on plaintiff's lack of standing to sue. The lack of standing issue arose because plaintiff's corporate name in its original State of Michigan filing in 1984 was "Balcom Marina Centres, Inc." However, throughout the original 1994 case, the 2005 case, and the 2008 case, plaintiff was incorrectly named as, and referred to as, "Balcom Marine Centres, Inc." Thus, defendants' motion for summary disposition also included a claim of plaintiff's lack of standing to sue because the company "Balcom Marine Centres, Inc." never existed.

Plaintiff filed an amended motion for partial summary disposition seeking a ruling in its favor on the standing issue. Plaintiff also moved to amend the pleadings in all three cases to reflect its correct name as "Balcom Marina Centres, Inc." Ultimately, the trial court agreed with defendants on the issues of res judicata and lack of standing. Thus, the trial court granted defendants' motion in its entirety and denied plaintiff's motions.

On appeal, plaintiff first argues that the trial court erred in finding that it lacked standing to sue and in denying its motion to amend the pleadings in all three cases to reflect its correct name as "Balcom Marina Centres, Inc." The trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(10) is reviewed de novo. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). An action must be prosecuted in the name of the real party in interest. MCR 2.201(B). The real party in interest is one who is vested with the right of action on a given claim. *Blue Cross & Blue Shield of MI v Eaton Rapids Comm Hosp*, 221 Mich App 301, 311; 561 NW2d 488 (1997). A domestic or foreign corporation may sue or be sued in its corporate name. MCR 2.201(C)(4); MCL 600.2051(3).

Plaintiff asserts that, as a general rule, the misnomer of a plaintiff may be rectified by amendment unless the amendment adds a new party. According to plaintiff, MCL 600.2315 allows the trial court to correct any defects in form including mistakes in the name of a party, even after judgment is issued. Plaintiff further contends that MCR 2.118 promotes amendment when no prejudice will result. Plaintiff alleges that given the facts of the present case it would elevate form over substance to prevent it from having its day in court because of the mistaken substitution of an "e" for an "a" in its name. For support, plaintiff cites a number of cases where the plaintiffs were permitted to correct the defects in their pleadings, including correcting the names of the parties, in the original lawsuit where the defect occurred.

On this record, the trial court properly denied plaintiff's motion to amend its pleadings in all three cases. There is no authority to allow the trial court to amend plaintiff's name in the previous two cases in 1994 and 2005. Contrary to plaintiff's argument, the court rules and

statutes cited by it do not authorize a different court in a different lawsuit, thirteen-and-one-half years after the original lawsuit, to go back and correct defects in the pleadings. Moreover, all the caselaw cited by plaintiff involves situations where the name of the party was corrected in the original lawsuit, not in a different lawsuit in a different court several years later. The defect in plaintiff's corporate name in the underlying two cases could only be resolved by the trial court in the underlying matters, after a motion filed by plaintiff under MCR 2.612 to re-open the cases, with notice to Rudholm under MCR 2.107 and MCR 2.612 and the opportunity to be heard. There is no law authorizing a trial court in a lawsuit to remedy such a defect in an earlier separate lawsuit, especially through a motion made by one party without any notice to the underlying opposing party. Thus, the trial court correctly found that it had no authority to allow plaintiff to amend its name in the two underlying lawsuits occurring in 1994 and 2005. As for the 2008 legal malpractice lawsuit, to allow plaintiff to make such an amendment would be a futile act because the trial court correctly dismissed that lawsuit based on the doctrine of res judicata.

Res judicata bars a second action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 418; 733 NW2d 755 (2007). Michigan courts apply the doctrine "broadly," holding that res judicata bars not only those claims that were actually litigated but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not. *Id*.

The plaintiff in a legal malpractice action must be able to establish proximate cause. There are two separate elements to the proximate cause requirement of a legal malpractice action: (i) cause in fact, and (ii) legal cause. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 585-587; 513 NW2d 773 (1994). Factual causation is established by showing "but for the attorney's alleged malpractice, [the plaintiff] would have been successful in the underlying suit." *Coleman v Gurwin*, 443 Mich 59, 63; 503 NW2d 435 (1993).

Plaintiff asserts that the elements required for the application of res judicata have not been met. According to plaintiff, in the 1994 case, although Rudholm was named as a party defendant, the trial court ruled that plaintiff could not present a "piercing the corporate veil" claim, and so the 1994 case proceeded against the corporation Marina only and not against Rudholm. Therefore, plaintiff claims the 2005 case against Rudholm did not involve the same party as the 1994 case and thus was not barred by res judicata. Plaintiff further contends the "piercing the corporate veil" claim was never tried in the 1994 case because, although plaintiff tried to present it, the trial court denied plaintiff's motion based on the fact that the motion was filed too late. Thus, plaintiff asserts that the essential facts necessary to pierce the corporate veil were never presented to the court in the 1994 case and the court made no ruling on the merits of that claim. Accordingly, plaintiff claims that the elements required for the application of res judicata have not been met.

Contrary to plaintiff's arguments, the 2005 case was barred by the doctrine of res judicata. The 1994 lawsuit concerned the identical subject matter and arose out of the same transaction as the 2005 lawsuit. There is an identity of parties or privies because Rudholm was a defendant in both cases. The 1994 case proceeded to trial against both Rudholm and Marina and the court entered a judgment, including the individual liability of Rudholm for a portion of the

total damages awarded (before the supplemental order was issued finding that Rudholm satisfied his portion of the judgment). Thus, Rudholm had been a party to the 1994 litigation from the beginning and his individual liability was at issue in that case. Finally, there was a final adjudication on the merits in the 1994 case and the trial court rendered judgment against Marina and Rudholm.

Although there was not an adjudication on the merits of the corporate veil piercing claim in the 1994 case, such an adjudication is not needed in order for res judicata to apply. Courts will apply res judicata broadly, precluding not only those claims that were brought and adjudicated but also those claims that could have been brought. *Washington,* 478 Mich at 418. The trial court in 1994 found that plaintiff's motion for amendment to add the corporate veil-piercing claim was brought too late and would prejudice Rudholm and Marina. Therefore, had plaintiff timely brought the claim, it could have and should have been adjudicated before the court in the 1994 case. Accordingly, all of the requirements for the application of res judicata have been met. The 2005 case was barred by res judicata, and thus plaintiff could not establish the proximate cause element of its legal malpractice claim against defendants in the 2008 case. The trial court correctly granted defendants' motion for summary disposition based on the doctrine of res judicata.

Affirmed. Defendants, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Pat M. Donofrio
/s/ Patrick M. Meter
/s/ Christopher M. Murray